1992

State of Utah v. Richard M. Martinez : Brief of Appellant

Utah Court of Appeals

Jay D. Edmonds; Attorney for Appellant.
R. Paul Van Dam; Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff-Appellee,	)	Case No. 920239-CA
	)	
vs.	)	Priority No. 2
	)	
RICHARD M. MARTINEZ,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

Appeal from a judgment of conviction entered in the Fifth Judicial District Court for Iron County, Parowan, Utah, the Honorable J. Philip Eves, presiding.

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IN THE UTAH COURT OF APPEALS

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JURISDICTION

This Court has jurisdiction to hear this appeal by virtue of the provisions of §78-2a-3(2)(f), Utah Code Annotated (1953) as amended.

ISSUES

1. Whether the Appellant was entrapped to commit the offense for which he was convicted. The standard of review is that if reasonable minds acting fairly on the evidence of entrapment should necessarily have a reasonable doubt as to the Appellant's guilt, he is entitled to an acquittal. State v. Kourbelas, 621 P.2d 1238 (Utah 1980).

2. Whether Rule 608(b) of the Rules of Evidence prohibits the testimony of a witness that an undercover police officer used illegal drugs during the time the officer was investigating the Appellant, where the officer had testified on cross-examination that she did not use illegal drugs during that time. The standard of review is whether the trial court's ruling excluding this evi-

dence constituted error affecting a substantial right of the Appellant. Utah Rules of Evidence, Rule 103(a); State v. Tucker, 800 P.2d 819 (Utah App. 1990) n.1 at 821.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

Utah Const. art. I, § 7: No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. art. I, § 12: In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. . . .

STATUTES

§76-2-303(1), Utah Code Annotated (1953): It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

RULES

> Utah Rules of Evidence Rule 608(b): Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. . . .

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a judgment of conviction based on a jury verdict finding Appellant guilty of distribution of a controlled substance, a second degree felony, in violation of §58-37-8, Utah Code Annotated (1953).

Course of Proceedings and Disposition in Court Below

Appellant was charged with two counts of distributing cocaine. At a pretrial hearing on Appellant's assertion of the defense of entrapment, the trial judge ruled that, as a matter of law, Appellant was not entrapped into commission of the offenses (R. 60).* The case was tried to a jury, which returned a verdict of not guilty as to one count and guilty as to the other. Appellant was sentenced to the statutory prison term, but was placed on probation on conditions including fines, restitution and serving 75 days in jail. This appeal followed.

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*The pretrial hearing on entrapment was heard on the same day as that in another case involving the same witnesses and counsel. The transcript of the entrapment hearing in this case does not include the trial judge's findings on the record. However, the transcript of the entrapment hearing in the other case (State v. LeVasseur) does contain the trial court's oral findings in this case. The pertinent pages of that transcript are included in the appendix to this brief.

Statement of Facts

I. The Police Conduct

Officer Anne Burchett met Appellant at a Cedar City bar in November of 1990 (T. 63).* Burchett was working as an undercover narcotics agent, attempting to establish social relationships in order to obtain drugs (T. 130). At this first meeting, the two made plans that she would later come to his home for dinner (ET. 12). When they got together at Appellant's house, he cooked dinner for her (ET. 13) and they sat in front of the fireplace (T. 94), where Appellant asked Burchett if she used cocaine. She said that she did (T. 65). During the conversation in front of the fire, Burchett mentioned that at her house she had some firewood that needed chopping (T. 95). A short while later, Appellant came to her house and chopped the wood (ET. 14). She made coffee and invited him in (ET. 15), and when he left, Appellant kissed her (T. 103; ET. 26). Some time before Christmas, they spent two or three hours together driving around the Cedar City area in Appellant's truck looking at Christmas lights (T. 67, 97; ET. 16).

On May 8, 1991, Appellant invited Burchett to his home after she finished work (PT. 6), and after some conversation in the kitchen, Burchett told him that as a bartender she knew a lot of people at her place of work who were looking for cocaine (T. 67; PT. 30). Appellant told Burchett that he would get the cocaine for

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*The record includes three transcripts, designated in this brief as follows: Trial ("T."), Pretrial Entrapment Hearing ("ET."), and Preliminary Hearing ("PT.").

her in Las Vegas, where the two went in Burchett's car on May 10, 1991 (T. 69). Burchett had told Appellant she didn't have the money to buy the drugs, so Appellant loaned her the necessary $350.00, which Burchett later paid back (ET. 33; T. 109). Appellant got the cocaine and gave it to Burchett when they returned to her house in Hamilton Fort (PT. 12).

After the first drug transaction, Appellant and Burchett continued their relationship, exchanging phone calls (ET. 19) and meeting at a bar (PT. 22). At one point, Burchett left a message on Appellant's answering machine asking him why he hadn't stopped by to pick her up on his way to go water skiing, since she wanted to go with him to the lake (T. 104). Some time before July 29, 1991, the two went on a date to Mesquite, Nevada to have dinner and to gamble, Appellant paying for the dinner and drinks (T. 105, 163; ET. 24). Burchett concedes that this date may have been at her suggestion (ET. 25).

On July 26, 1991 Appellant asked Burchett if she wanted to get more cocaine to sell (T. 78), and, after arranging with her supervisors to get the money, Burchett called Appellant back and told him yes. The two originally planned that Burchett would again accompany Appellant to Las Vegas to get the drugs(ET. 21), but, being unable to arrange details with her supervisors, Burchett told Appellant at the last instant that her parents had been in an automobile accident in Salt Lake City, and that she had to go there instead (T. 81). Burchett took Appellant the agreed sum of $750.00, leaving it with him at his house, and telling him she was on her way to Salt Lake City (T. 82). On July 29, 1991, Ap-

pellant phoned Burchett, telling her he'd gotten the cocaine in Las Vegas, and arranging for her to pick it up at his house on that day (T. 84).

Agent Burchett was operating in a system where there were no written rules or policies governing the conduct of undercover agents (T. 151), and where it was considered important and necessary for her to develop close personal relationships with people in order to buy drugs (T. 161). Although she made written reports detailing actual drug transactions, she did not consider it important to make written reports about all the other contacts she had with Appellant when drugs were not discussed or transacted (T. 100, 101), including kissing, holding hands (PT. 34), discussing religion (T. 98) and personal phone calls between the two in which drugs were not mentioned (ET. 20). Agent Burchett's conduct as an undercover officer was governed only by the personal opinions of her supervisor Garth Wilkinson as to the propriety of her behavior (T. 151-154) and by her own "common sense" (T. 90); she was so unfettered that on one occasion she engaged in sexual intercourse with a "target defendant," (T. 119) who was subsequently not prosecuted (T. 126).

II. The Disputed Trial Testimony

During cross-examination agent Burchett denied using illegal drugs in the course of her investigation of Appellant (T. 112). The defense produced a witness, Jeff Farr, who was prepared to testify that he knew agent Anne Burchett intimately

during the time she was working on Appellant's case, and that Burchett used cocaine and marijuana with the witness on several occasions (T. 133). Farr was also prepared to testify that he was familiar with the effects of illegal drugs, and that on many occasions he observed Burchett to be under the influence of the drugs they used together, inconsistent with Burchett's only having simulated the use of the drugs (T. 134). The prosecutor objected to the admission of this testimony on the ground that it was prohibited by Rule 608(b) of the Utah Rules of Evidence (T. 134), and the trial judge sustained the objection, ruling the proferred testimony inadmissible (T. 141).

SUMMARY OF ARGUMENTS

1. The conduct of the police in procuring drugs from the Appellant was entrapment within the meaning of §76-2-303(1), Utah Code Ann. (1953), as enacted by Laws, 1973. The evidence establishes as a matter of law that Anne Burchett induced the commission of the offenses by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Reasonable minds acting fairly on the evidence should necessarily have a reasonable doubt as to the Appellant's guilt.

2. The trial judge incorrectly excluded the testimony of defense witness Jeff Farr under Rule 608(b). The testimony was admissible as impeachment of agent Anne Burchett. The exclusion of the testimony was a denial of Appellant's right to due process and to present witnesses in his defense, in violation of Utah Const. art. I, §7 and §12.

ARGUMENT

POINT I: THE POLICE CONDUCT IN PROCURING DRUGS FROM APPELLANT WAS ENTRAPMENT.

The defense of entrapment set forth in Utah Code Ann. §76-2-303(1) (1977) embodies an objective standard, focusing the inquiry to the nature of the police conduct:

> "Under the objective view of entrapment, the focus is not on the propensities and predisposition of the specific defendant, but on whether the police conduct falls below standards to which common feelings respond, for the proper use of government power. This concept establishes entrapment on its historical basis, the refusal to countenance a perversion of justice by government misconduct. The objective view provides a solid definitive standard upon which the defense can rest, i.e., does the conduct of the government comport with a fair and honorable administration of justice?" State v. Taylor, 599 P.2d 496 (Utah 1979) at 500.

In each entrapment case the propriety of the inducement by the police is measured by its probable effect on a hypothetical person in the setting in which the inducement took place. State v. Wright, 744 P.2d 315 (Utah App. 1987). Every case in which the defense is raised must be carefully examined on its own facts, State v. Wynia, 754 P.2d 667 (Utah App. 1988), and the Utah Supreme Court has suggested that the very circumstances in this case may go beyond the proper exercise of the government's power:

> "Extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close personal friendship, or offers of inordinate sums of money, are examples, depending on an evaluation of the circumstances in each case, of what might constitute prohibited police conduct. In evaluating the course of conduct between the government representative and the defendant, the transactions leading up to the offense, the interaction between the agent and the defendant, and the response to the inducements of the agent, are all to be considered in judging what the effect of the government agent's conduct would be on a normal person." Taylor, 599 P.2d at 503 (emphasis added).

Agent Burchett's procurement of drugs from Appellant resulted from an appeal based primarily on the close personal friendship the two shared. When she initiated the first drug transaction on May 8, 1991 by telling Appellant that her friends were looking for cocaine (T. 108), she and Appellant, after having met initially at a bar, had shared a dinner for two at his house; he had come to her house and chopped wood for her, drunk coffee in her kitchen, and kissed her. They had spent a few hours together riding in Appellant's truck around Cedar City looking at the Christmas lights, and had phone conversations unrelated to drug transactions (T. 104). They had, in Burchett's own words, established a "social relationship" (T. 130) in which she had gained his "trust and confidence" (T. 128), a relationship upon which she clearly relied when she initiated the first transaction. In the language of Taylor these transactions leading up to the first offense, the interaction between Burchett and Appellant,

and his response to her inducements point inescapably to the conclusion that Burchett's conduct created a substantial risk that the offense would be committed by one not otherwise ready to commit it.

While the evidence in this case does not involve a sexual relationship between Appellant and agent Burchett [as, for example in Taylor and in State v. Curtis, 542 P.2d 744 (Utah 1975)], the male-female aspect cannot be ignored, and the fact that Burchett is a woman is absolutely vital in considering the effect of her friendship with Appellant. The intimate dinner he cooked for her at his home, the nighttime car ride to look at the Christmas lights, and the favor of chopping wood are not events which normally transpire between mere friends of the same sex. This was a dating relationship despite Burchett's attempts to deny that fact (PT. 33), and during the trial even she became resigned to the proposition that her contacts with Appellant, such as the pleasure trip to Mesquite, Nevada, were "dates" (T. 105). And although she made some distinction between his kissing her and her kissing him (T. 103), Appellant's motivation was obviously one of affection. Burchett regarded the social aspects of the relationship as unimportant (T. 101), but these events are at the core of entrapment:

> "The government, once employing an undercover agent, cannot choose to select those actions of the informer which are beneficial to its case, and refuse to be responsible for the total conduct of its agent while engaged in the deception." State v. Curtis, 542 P.2d 744, 751 (Utah 1975) (Maughan, J. dissenting).

Burchett's total conduct in this case falls far below the proper use of governmental power, Sherman v. United States, 356 U.S. 369, 382 (1957) (Frankfurter, J., concurring), and is completely contrary to the fair and honorable administration of justice. She clearly "capitalized on a special relationship," State v. Wright, 744 P.2d 315, 319 (Utah App. 1987), appealing to the friendship she had established with the Appellant, stepping entirely beyond the limits on permissible police activity in an advanced society. State v. Taylor, 599 P.2d 496, 502 (Utah 1979). The relationship between Burchett and Appellant was significantly more intimate than that between the agent and defendant in State v. Kaufman, 734 P.2d 465 (Utah 1987), a case in which the Utah Supreme Court, affirming the trial judge's ruling that the defendant had been entrapped by the female officer, commented:

> "Clearly, the defendant saw more in her than a business relationship. Why didn't the police send in a male officer? Or an unattractive female police officer? The answer is clear from the relationship which developed." 734 P.2d at 468.

This case must be distinguished from State v. Wynia, 754 P.2d 667 (Utah App. 1988), in which two undercover females had only two contacts with the defendant, each occasion resulting in the defendant's sale of drugs to the agents. These meetings were in a public bowling alley/lounge and in a second lounge, and, except for an agent buying the defendant drinks, nothing else other than the drug transactions took place between the agents and the defendant. This Court found no entrapment, ruling that

the police conduct was consistent with the fair and honorable administration of justice. 754 P.2d at 670. The relationship between Appellant and Burchett, however, had progressed far beyond the superficial contacts this Court approved in Wynia; by the time the drug transactions took place, they had spent many hours alone together, establishing at least a close personal friendship which had many of the elements of a romance.

POINT II: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING THE TESTIMONY OF DEFENSE WITNESS JEFF FARR.

I. Statutory and Decisional Law

The trial judge ruled that the testimony of Jeff Farr was inadmissible as a "specific instance of the conduct" of agent Anne Burchett and therefore unprovable by extrinsic evidence within the prohibition of Rule 608(b) of the Utah Rules of Evidence. Because the witness Anne Burchett had in her trial testimony denied that she had used illegal drugs during her investigation of Appellant's case, Jeff Farr's proffered testimony that he had personally observed Burchett to use and be under the influence of illegal drugs during that time directly impeached the testimony of agent Burchett. Even if his testimony was otherwise prohibited by Rule 608(b), it was nonetheless admissible impeachment of Burchett:

> "In accordance with Rule 608, Utah courts have consistently held that impeachment evidence is admissible if it goes to credibility, even though it introduces evidence which would be otherwise inadmissible." State v. Reed, 820 P.2d 479, 481 (Utah App. 1991).

In Reed, the defendant had testified that he had told a witness that he did not use drugs, and this Court approved the prosecutor's subsequent inquiry of both the defendant and a third witness about drug paraphernalia found at the defendant's house. The Court observed that credibility was a crucial issue; first, the defendant's testimony had directly contradicted that of another witness. Second, the defendant's testimony directly attacked the character of another witness. Third, the defendant had denied the use of drugs, and the Court ruled that inquiring into the presence of drug paraphernalia in the defendant's house was permissible impeachment. 820 P.2d at 481.

This case is factually identical to Reed. Burchett had testified that she did not use illegal drugs during her undercover assignment, and Farr's testimony had a direct bearing on her credibility on that point. In addition, in this case, the entire behavior of the police was the only issue before the jury, and Farr's testimony was monumentally important to the inquiry (T. 135). His evidence was manifestly much more than the general attack on credibility prohibited by Rule 608(b), State v. Hackford, 737 P.2d 200 (Utah 1987), and was improperly excluded by the trial court. The error affected the substantial right of the Appellant to present his defense of entrapment, the only defense offered, and was therefore reversible, Utah R. Evid. 103(a), a proffer of the substance of Farr's testimony having been made on the record (T. 133).

II. Constitutional Basis

The trial court's exclusion of the testimony of defense witness Jeff Farr prevented Appellant from presenting his only defense witness, whose testimony had a direct bearing on the credibility of the undercover agent and upon the propriety of the police conduct in this case, the very issue raised by Appellant's defense of entrapment. Appellant was thus deprived of his fundamental right to present a witness in his defense, and the deprivation was of constitutional dimensions. Although the Utah Supreme Court has held that the violation of an evidentiary standard is not in every case a constitutional deprivation, State v. Hackford, 737 P.2d 200, 205 (Utah 1987), this Court is urged so to hold in this case.

A. Due Process

An early Utah case dealing with Art. I, §7 of our state Constitution observed:

> "Many attempts have been made to further define 'due process' but they all resolve into the thought that a party shall have his day in court -- that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or defense, after which comes judgment upon the record thus made." Christiansen v. Harris, 163 P.2d 314, 316 (Utah 1945).

In the circumstances of this case, the language of Christensen is directly in point. Because Jeff Farr was the only defense

witness other than hostile police officers, and because his testimony had a direct bearing on the credibility of the state's principal witness and upon the propriety of the conduct of the police, his exclusion as a witness prevented Appellant from having his "day in court," and denied Appellant the "privilege of being heard and introducing evidence to establish" his defense. The error in excluding Farr's testimony was therefore a denial of Appellant's right to due process guaranteed by Utah Const. art. I, §7.

B. Right to Present Witnesses

The language of Utah Const. art. I, §12 includes the right of the accused "to have compulsory process to compel the attendance of witnesses in his own behalf . . ." Implicit in this language is the right to present such witnesses at trial. No Utah case has dealt with this aspect of our Constitution, but the Maryland Court of Special Appeals has recognized the right of a defendant to present witnesses in his defense as being based in a Maryland Constitutional provision similar to Utah's. In Brooks v. State, 560 A.2d 56 (Md. App. 1989), the court held that the trial court's erroneous exclusion of a defense witness who would have testified in a DUI case that the defendant was not driving the car amounted to a violation of the defendant's right under Article 21 of the Maryland Declaration of Rights to "present witnesses in his defense." 560 A.2d at 59. Article 21 of the Declaration of Rights under the Constitution of Maryland guarantees criminal de-

fendants the right "to have process for his witnesses; to examine the witnesses for and against him on oath . . ." This Court is invited to find the identical right to present witnesses in Article I, §12 of the Utah Constitution, and to hold that this right cannot be abrogated by a statutory rule of evidence, nor by the erroneous application of such a rule as occurred in this case.

CONCLUSION

The Appellant was entrapped into commission of the offense for which he was convicted, and this Court should reverse the conviction. If the Court does not reverse on the entrapment issue, it should hold that the exclusion of the testimony of Jeff Farr was error affecting the substantial right of Appellant to present his defense, both as a matter of statutory and decisional law, as well as under the Constitution of the State of Utah. If the Court reverses on this ground, the case should be remanded to the District Court for a new trial on Count II of the Information.

Respectfully Submitted,

JAY D. EDMONDS #957
Attorney for Appellant

CERTIFICATE

I certify that on August 31, 1992, I delivered four copies of the foregoing Brief of Appellant to the Utah Attorney General, 236 State Capitol Bldg., Salt Lake City, Utah.

APPENDIX

Note: On January 23, 1992, a hearing was held on Appellant's Motion to Dismiss Based on Entrapment in this case below. A similar hearing on a similar motion was heard at the same time in the case of State v. LeVasseur, since the same witnesses and the same counsel were involved in both cases. Both cases are now on appeal to this Court. State v. LeVasseur is assigned Case No. 920444-CA in this Court. The record on appeal in each case includes a separate transcript of the January 23, 1992 entrapment hearings held in the District Court. In preparing these two separate transcripts, however, the reporter, for the sake of continuity and in conformity with the procedure followed by the trial judge in making his rulings, included the court's findings and conclusions on Appellant Martinez' motion only in the LeVasseur transcript; the Martinez entrapment hearing transcript in the record in this case does not contain these findings and conclusions. An exact photocopy of that part of the LeVasseur entrapment hearing transcript which contains the Martinez findings and conclusions is therefore included in this Appendix. The original of these photocopied pages is in the original transcript on file in this Court under Case No. 920444-CA.

MR. BURNS: Okay. Moore and Belt are 1989 cases, and Moore and Belt cite the law in the state of Utah as being a normal or an average person. Five years newer than the Cripps case. I think the cite that counsel got came out of the right case, 744, but it's actually 692 P2d. 747.

MR. EDMONDS: That was the cite that I gave the Court.

THE COURT: That's correct.

Well, as I indicated, I'd -- I don't really think there's any dispute as to what the law is. It's been articulated now in several cases. All of which I've read. I think the law is that entrapment occurs when a law enforcement officer or person directed by or acting in cooperation with an officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. I think that's what the law is, and I think that's what the courts have held. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The focus of that section is whether the conduct of the police was such that it falls below proper standards for the proper use of government power. In other words, whether it comports with a fair and honorable administration of justice. And these cases all turn on their facts.

In Mr. Martinez' case, the facts, as I have them at this point, indicate that upon his first meeting with the undercover agent in November of 1990, he inquired as to whether she used coke and further told her about his having used coke the prior weekend. Their next discussion about coke was when she was at his house for dinner. She indicated that she had some customers that would like to obtain coke, and he came up with a suggestion that she could make a lot of money. That he had a contract in Vegas and could get her -- get her the cocaine from there.

There were -- is no evidence before me of any intimate relationship, although there is friendship. And the Moore case clearly holds that friendship alone is not enough. There must be more. There must be some inappropriate plea to the defendant's sympathy or to his passions through promises of sexual favors or through an ongoing sexual relationship.

None of that occurred in this case. The agent didn't offer Mr. Martinez any large amounts of money. In fact, Mr. Martinez apparently profited little from these transactions, except that he may have had some aspirations for an improvement in the intimacy of their relationship. But the agent did nothing to encourage that, so far as the evidence indicates at this point.

The relationship lasted from November to July, and

there was no sexual conduct, no offer of sexual conduct, and no promise of any sexual conduct in exchange for cocaine.

The issue was raised as to whether or not there had been an appeal -- an inappropriate appeal to the defendant -- defendant's sympathies when the agent informed the defendant that her parents had been involved in an accident. I don't find that that was an attempt to appeal to his -- his sympathies. Even if it was, the trip to Las Vegas for the second batch of cocaine had already been planned. They were both going to go. He did not go simply because he'd been informed that her parents had been in an accident. He simply carried out the prearranged plan without her and brought the cocaine back to her.

All in all, I find that the defendant was not entrapped. That none of the agent's conduct was such that would violate proper standards of use of governmental power. And that -- I cannot find, as a matter of law, that he was entrapped. Although I understand that the issue can be reasserted before a jury, and they can make their own finding. The agent in this case merely provided an opportunity to commit the offense, and it was the defendant who appeared to be interested in -- in cocaine, from the outset.

Any questions?

MR. EDMONDS: I have nothing.